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No.85-899

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent,

BRIEF IN OPPOSITION TO THE STATE OF CONNECTICUT'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

ROBERT L. GENUARIO
Attorney at Law
Busek, Kavanewsky & Genuario
45 East Avenue
Norwalk, CT 06852-2044
(203) 847-5756

G. DOUGLAS NASH
Attorney at Law
Chief Public Defender's Office
121 Elm Street
New Haven, CT
(203) 789-7477

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QUESTIONS PRESENTED

Should the United States Supreme Court review a decision of the Connecticut Supreme Court when it is not in conflict with any decision of any other State Court of last resort or in conflict with any decision of any Federal Court of Appeals nor in conflict with any applicable decisions of the United States Supreme Court?

In ruling that the defendant invoked his right to counsel by refusing to give a written statement without the assistance of an attorney, and in finding that the defendant did not subsequently waive that right did the Connecticut Supreme Court commit Constitutional error?

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The respondent respectfully requests that the writ of certiorari requested by the Office of the State's Attorney of the State of Connecticut reviewing the decision and judgment of the Connecticut Supreme Court entered on July 30, 1985 be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1

Revised Rules of the Supreme Court
of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

b. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

c. When a state or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

The defendant appealed his conviction of Sexual Assault in the First Degree, Unlawful Restraint in the First Degree, and of violation of the State's Narcotic Drug Act, Connecticut General Statute Sections 53a-70, 53a-95 and 19-481c (Rev. 1982) to the Connecticut Supreme Court arguing inter alia that the trial court erred in refusing to suppress oral statements made by the defendant during the course of a custodial interrogation. The opinion of the Connecticut Supreme Court noted the following pertinent facts:

1. The interrogating officers were aware that the defendant had never been arrested previously.

2. The defendant informed the interrogating officers that he did not wish to give a written statement without an attorney.

3. Without further inquiry, the officers proceeded to interrogate the defendant and attempted unsuccessfully to tape-record the conversation of the defendant without the defendant's knowledge.

4. The defendant again stated that he did not wish to give a written statement without an attorney and the officers again interrogated the defendant without any attempt at clarification of that request. The officers again attempted unsuccessfully to tape-record the conversation of the defendant without the defendant's knowledge.

5. The trial court found that the defendant had requested counsel.

6. The police understood this request for counsel.

7. One of the interrogating officers interpreted a phone call by the defendant as being a call to an attorney and further assumed that the attorney was in transit to the police station.

8. The defendant initiated no discussions with the police after requesting counsel and all such subsequent discussions were initiated by the police.

The Connecticut Supreme Court upheld the trial Court's finding that the defendant had invoked his right to counsel but rejected the trial Court finding that the defendant had intelligently and voluntarily waived the right to counsel after this invocation.

The State of Connecticut now petitions this Court to reverse the decision of the Connecticut Supreme Court.

REASON FOR DENYING THE PETITION

Rule 17.1 of the revised rules of the Supreme Court of the United States sets forth the fact that a review on writ of certiorari is not a matter of right, but is one of judicial discretion. It will be granted only for reasons consistent with the character of reasons set forth in Rule 17.1.

It is submitted that the State of Connecticut, in petitioning this Court, has set forth no reasons consistent with Rule 17.1 The petitioner has pointed to no federal court of appeals' decisions or state court of last resort decisions which are in conflict with the Connecticut Supreme Court decision in the case at bar. The petitioner is pointed to no decisions of the United States Supreme Court which are in conflict with the decision of the Connecticut Supreme Court.

Rather, the petitioner argues that the Connecticut Supreme Court has unduly expanded the protections accorded criminal defendants under the Fifth Amendment of the United States Constitution. This is not the case. The decision of the Connecticut Supreme Court is merely the application of the particular factual situation before it to time-honored principals enunciated by this Court.

Reviewing all the facts before it, the Connecticut Supreme Court determined that the defendant invoked his right to counsel by requesting counsel before making a permanent record of his statements and by, in fact, calling counsel with the knowledge of the police. This is certainly consistent with the landmark ruling in Miranda v. Arizona, 384, U.S. 486, 86 S. Ct. 1602, 16 L. Ed. 2d 694:

> "If, however, he indicates in any manner and at any stage of the process, that he wishes to consult with an attorney before speaking, there can be no questioning.

Miranda v. Arizona, supra (emphasis added). See also, Fare v. Michael C., 442 U.S. 707,719,99 S. Ct. 2560, 61 L. Ed. 2d 197, Reh. Denied, 444 U.S. 887, 100 S. Ct. 186, 62 L. Ed. 2d 121 (1979). There is nothing in the record to indicate that the interrogating officers made any attempt to clarify the defendant's request or any attempt to honor the defendant's rights. In fact, the record indicates that the interrogating officers made every attempt to circumvent the rights of the defendant by tape-recording a conversation without the defendant's knowledge, after he clearly indicated he desired not to make a permanent record of his statements without the benefit of counsel and by continuing their interrogation even though they believed that the defendant's attorney was on his way to the station.

Moreover, this Court has held that once a defendant invokes his right to counsel in any manner, there can be no waiver of that right unless the defendant initiates the subsequent encounter with the policy. Solem v. Stumes, 465 U.S. 653 104 S. Ct. 1338, 1343, 79 L. Ed. 2d 579 (1984); Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, Reh. Denied, 452 U.S. 1973, 101 S. Ct. 3128, 69 L. Ed. 2d 984 (1981).

There is absolutely no evidence in the record to indicate that the defendant initiated the contact with the police officers after he had invoked his right to counsel.

It is submitted that the decision of the Connecticut Supreme Court, rather than being constitutional error, was a laudable one which turned on the unique facts of the case at bar and that the decision of the Connecticut Supreme Court was totally consistent with the applicable principals of Constitutional law set forth by this Court.

CONCLUSION

It is respectfully requested, for all of the reasons stated, that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED

By _____

Robert L. Genuario
Commissioner of the
Superior Court
Busek, Kavanewsky & Genuario
45 East Avenue
Norwalk, CT 06852-2044
Juris No. 101313
Telephone (203) 847-5756

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This is to certify that a copy of the Respondent's Brief and Opposition to the State of Connecticut's Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut was mailed postage pre-paid to Michael Dearington, Esq., Assistant State's Attorney, 235 Church Street, New Haven, Connecticut 06510 on March 12, 1986.

Robert L. Genuario